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No. 97-177

In the Supreme Court
of the United States

October Term, 1997

BEN ADAMS,
PHILIP JACKSON, Petitioners,

- versus -

CITY OF JERSEY CITY, Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for
the Third Circuit

PETITIONERS' REPLY
TO THE BRIEF IN OPPOSITION

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REPLY TO THE OPPOSITION TO CERTIORARI

Petitioners' Complaint pleaded for a first cause of action that the General Order reducing their rank and pay violated their "procedural and property rights." This assertion of both substantive and procedural claims was made at the outset of the case and has never been abandoned.

The case was dismissed without ever resolving Petitioners' substantive claims of improperly broken tenure. Instead, the courts below indulged Respondents' argument that the CBA arbitration procedure, which did not and could not resolve substantive tenure claims, provided all the process that was due. App. 21.

However this Court ultimately resolves the tension between CBA arbitration and statutory civil rights protections, the Petition presents an appropriate vehicle for making clear that civil rights claims which are beyond the scope of a CBA arbitration clause cannot be destroyed by the mere existence of that clause. Nothing written by Respondent is to the contrary.

A. At issue is job tenure, and not merely pay. Citing only to the district court's July 18, 1997 opinion,[1] Respondent asserts that "in count one, [Petitioners alleged that they] had been denied a property interest in receiving Detective's pay. (Pet. App. 11)." Opp. 1. In fact, the Complaint asserted that Petitioners both held "tenure in rank" as Detective, and were "entitled to the pay **and emoluments** of that office" (emphasis added). Respondent nevertheless tries to trivialize the Complaint as merely attacking elimination of the Detective pay differential. Opp. 11-12.

By emphasizing the pay differential component to the exclusion of the many other benefits of Detective status, Respondent makes the underlying dispute appear to fit within the terms of the CBA when it does not. This fundamental misunderstanding is also at the heart of the district court's opinion granting defendants summary judgment and of the Third Circuit's affirmance.

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[1] The Opposition is notable in that it cites repeatedly to the district court's opinion as authority for the correctness of the district court's decision. A more obvious case of trying to lift oneself by one's own bootstraps is hard to imagine.

The CBA provided a final pay step for those civil service Patrol Officers who were (non-civil service) Detectives, but it did not determine who was to be a Detective. See App. 37. Petitioners' entitlement to the rank and pay of Detective arose separate and apart from the terms of the CBA, and therefore could not be determined under the CBA. App. 34.

Petitioners' union would not advance their tenure claim because it was outside the arbitrator's jurisdiction; and if Petitioners had sought CBA arbitration on their own, the CBA's jurisdictional limitation would have made the resort to arbitration an exercise in futility. Consequently, Respondent's harping on the failure of Petitioners to pursue arbitration (Opp. 12) is utterly irrelevant to the merits and to this Petition. This is because the gist of the grievance was tenure, and for Petitioners, questions of pay would turn on the outcome of the tenure determination.

On the union's pay grievance, the CBA arbitrator correctly refused to reach the tenure issue. He explicitly recognized, "If there is a property interest, then the officer may have other rights but those are independent of his rights under the CBA." App. 9. The

courts below also refused to reach the tenure issue, believing that the mere existence of the CBA arbitration mechanism provided all the process that was due. Yet Respondent itself admitted that questions of tenure had to be resolved judicially. *See* Opp 12.

There was never a judicial resolution of the tenure claims raised in count one of Petitioners' Complaint. In essence, the arbitrator and the district judge each concluded that the other's forum was the appropriate one, leaving no forum whatsoever to hear the merits of Petitioners' tenure claim.

B. Respondent does not address the questions presented. The Opposition does not really speak to the two questions presented in the Petition. They are both important questions which potentially would have a jurisprudential impact upon a multitude of recurring disputes.

Question 1 is addressed to the interplay between *McDonald v. City of West Branch,* 446 U.S. 284 (1984), and *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991). Those cases, as well as the controversial decision in *Pryner v. Tractor Supply Co.,*

109 F.3d 354 (7th Cir. 1997) -- in which cross-petitions for certiorari are pending -- are not even mentioned by Respondent, except in one paragraph. Opp. 8. The argument offered there boils down to the following flawed syllogism: Because *federal courts* rather than the *CBA arbitrator* determined that the arbitration procedures comported with constitutional requirements, there can be no constitutional question for this Court to resolve.

To be sure, as Respondent asserts, consistent with Third Circuit doctrine the district court held that "`the role of the grievance/arbitration procedures is not to determine whether or not plaintiffs have been afforded due process. Rather, the role of the grievance/arbitration procedure is to afford plaintiffs with due process' (Pet. App. 21)." Opp. 8-9. The trial judge continued (Opp. 9): "In other words, the grievance/arbitration procedure is the process," and the Third Circuit agreed.

The quoted language, even if appropriate in other circumstances, begs the crucial issue presented as Question 2 in our Petition: Does a grievance/arbitration procedure which cannot and does not resolve tenure claims provide constitutionally adequate

protection for government employees whose tenure has been breached by administrative fiat? The answer to this question ought be self-evident, but it was completely overlooked in the courts below.

C. Count two and its waiver are not before this Court.

Respondent goes on at some length about count two of the Complaint. In the district court, Petitioner Jackson but not Petitioner Adams advanced count two. It challenged Petitioner Jackson's assignment to patrol duties by an October 23, 1989 Personnel Order, more than three months after the demotions from Detective which are at issue in count one. The trial court held that "Jackson's claim in Count 2 of the complaint was waived because he failed to set forth in the Revised Final Pretrial Order any facts he intends to prove regarding this." App. 11.

That holding was not challenged in the court of appeals. Therefore count two was no longer in the case, and nothing in count two could be or was questioned in the Petition.

Precisely because count two is not before this Court, arguments addressing that cause of action are wholly out of place. Nevertheless, Respondent repeatedly alludes to a "waiver" fatal to count two. For example, the caption to Opposition Point II asserts a waiver, but the only waiver mentioned in the accompanying text is that "Petitioner Jackson waived count two of the Complaint." Opp. 11. *See also* Opp. 9 (second full paragraph).

Worse, Respondent inexcusably and without citation to authority asserts that the waiver of count two waived everything, when there is no basis whatsoever in the record or in the law for that claim. Specifically, as to the Question 2 assertion regarding count one that Petitioners' tenure claim could only be resolved judicially but the judiciary refused to do so, Respondent offers the following concluding paragraph (Opp. 12):

> Finally, Petitioners assert that because the arbitrator did not address the issue of job tenure and Respondent's admission that the tenure claim could only be resolved judicially, they have been denied due process. (Pet. Cert. 25). Petitioners, however, fail to advise the Court that Petitioner Jackson waived this claim through

> his inability to comply with the Pretrial Order. Consequently, the Petitioners have not suffered a deprivation of due process.

Obviously, objections to the singular error in the decisions below -- that under Third Circuit doctrine, no impartial tribunal is competent to adjudicate the tenure claims in count one -- were not waived by Petitioner Adams when Petitioner Jackson elected not to go forward on count two, to which Adams was not even a party. And Petitioner Jackson's abandonment of count two did not and could not waive his claim on count one, which is the only cause of action the Petition addresses.

D. The defense on the merits of the tenure claims is weak. Respondent argues the merits of the tenure claims, instead of the merits of the Petition. Specifically, it asserts technical defenses to George Act tenure. Opp. 3.

While the ultimate merits are beyond the scope of this Petition, the asserted defenses are extremely dubious. In its first decision, the trial court correctly recognized that those defenses rest on disputed facts and must be tried. App. 30-31. Furthermore, the

CBA provision for premium Detective pay and the continuing funding of Detective salaries certainly was known to and authorized by the City Council. This should be dispositive, because under New Jersey law, it works a ratification by City Council of Petitioners' "permanent" appointments as Detectives. *Cf. Casamasino v. City of Jersey City*, ___ N.J. Super. ___, 1997 N.J. Super. LEXIS 368, *6-*8 (App. Div. Sept. 2, 1997) (holdover Tax Assessor acquired tenure without formality of City Council vote).

E. The Third Circuit in fact bars all § 1983 employment claims by unionized workers. Respondent argues (Opp. 7):

> Nothing in the *Dykes* [*v. SEPTA,* 68 F.3d 1354 (3d Cir. 1995, *cert. denied*, 116 S.Ct. 1434 (1996)] holding creates a presumption, as alleged by Petitioners, that all municipal grievance procedures established by a collective bargaining agreement satisfy constitutional requirements, and obviate the need for case-by-case review."

While *Dykes* does not make this presumption explicit, application of the *Dykes* doctrine has closed Third Circuit courts to § 1983 claims by unionized municipal employees. The court below

had a clear opportunity in this case to acknowledge that for the issue of Detective tenure which Petitioners raised, the CBA simply is not "an *adequate* grievance/arbitration procedure" for purposes of satisfying Fourteenth Amendment requirements. Opp. 6, *quoting Dykes,* 68 F.3d at 1564 (Respondent's emphasis). The court of appeals' acceptance of the trial court's analysis therefore is tantamount to an admission that *Dykes* creates an irrebuttable presumption foreclosing all § 1983 claims by unionized municipal employees.

Conclusion. For the foregoing reasons and those previously stated, the Petition for Certiorari should be granted.

Respectfully submitted,

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Dated: September 19, 1997.